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IN THE

# Supreme Court of the United States

OCTOBER TERM - 1971

No. 71-248

LEO JOSEPH SAITTA,
*Petitioner*

*v*

UNITED STATES OF AMERICA,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, LEO JOSEPH SAITTA, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this cause on June 15, 1971, with re-hearing denied on July 19, 1971.

## OPINION BELOW

The opinion of the Court of Appeals to be reviewed is not reported but is printed, with the denial of the petition for rehearing, in the appendix hereto.

## JURISDICTION

The opinion of the Court of Appeals was entered on June 15, 1971. A timely petition for re-hearing was filed and denied by an order entered July 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

May the prosecution deprive the accused of any meaningful discovery of handwriting samples in violation of Rule 16 of the Federal Rules of Criminal Procedure and in violation of two orders of the District Judge requiring production and thereafter secure the conviction of the accused by the use of such handwriting samples?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall. . .be deprived of life, liberty or property, without due process of law; . . .'

The Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall. . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

> "a) Upon motion of a defendant the Court may order the attorney for the government to permit the defendant to inspect and copy or photograph and relevant. . .(2) results or reports . . . of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government. . ."
> b). . . Upon motion of a defendant the court may

order the attorney for the government to permit the defendant to inspect and copy or photograph. . . papers, documents . . . or copies or portions thereof, which are within the possession, custody or control of the government, . . ."

## STATEMENT OF THE CASE

Petitioner, LEO JOSEPH SAITTA, was convicted on a two-count indictment charging transportation of a stolen automobile from New York to Florida in violation of 18 USCA §2312, and conspiracy to violate the same statute in violation of 18 USCA §371.

Some ten months prior to trial, on November 3 1969, Saitta filed a motion, pursuant to Rule 16 of the Federal Rules of Criminal Procedure for discovery and inspection of certain items including "results of reports . . . of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government . . ."

The District Court entered an order on November 26, 1969, granting the above described requests and ordered the reports furnished within 15 days after receipt by the United States Attorney. All books, papers, and documents, or portions thereof were also ordered produced.

On September 9, 1970, the prosecutor, by letter, notified Saitta's counsel that the F.B.I. laboratory concluded that a signature on a Florida Highway Patrol ticket was that of the accused. The letter stated that "if there is any particular item that you would like to see in advance of the eve of the trial, please bring this matter to my attention . . ." Saitta's counsel responded:

"Thank you for your letter of September 9, 1970. Please note that paragraph 3b of the Ordered by Judge Krentzman requires the delivery of reports of such scientific tests or experiments made in this case. Certainly handwriting comparison and /or fingerprint identification would come within the scope of this order and we request that copies of the reports be furnished to us as soon as possible.

In addition, I would like to have an expert of my own choosing conduct his own handwriting and/or fingerprint identification and therefore I would need the original for him to examine and a time, date and place for him to do so.

Although the witnesses are bringing the other documents with them on the date of the trial, it would seem to me that photocopies could be prepared and furnished us in advance so that we could properly prepare our defense. Receiving documents on date of trial is not sufficient time to examine them and conduct witness interviews pertaining to them. Until we have the time to review these documents contained in your letter, a questioning of the witnesses would probably be of little value.

Therefore, we respectfully request that photocopies of all documents be furnished to us as soon as possible and that a time, date and place be set for the handwriting and/or fingerprint identification involved in this case.

Thank you for your expected cooperation."

Neither the handwriting exemplars nor the F.B.I. report were produced until the evening before the trial commenced. They were not produced even though a second order by the District Court was entered seven days prior to trial ordering as follows:

"1. The government shall produce such handwriting and/or fingerprint reports within its possession, custody or control immediately for the examination photographing or copying by the Defendant."

2. The government shall produce such documents by which the handwriting identification was made of the Defendant which shall include the Florida Highway Patrol traffic ticket #981225B immediately for the examination photographing or copying by the Defendant.".

The report and handwriting exhibits were finally produced on September 22, 1970, and the trial commenced, September 23, 1970. A motion for continuance by the accused, based upon Saitta's good faith effort to obtain a handwriting expert of his choosing to examine the documents, was denied. The only expert in the area was temporarily out of the city but would return in a reasonably short time. Even a short continuance was denied. The handwriting exhibits, and the F.B.I. handwriting expert's testimony, were used against Saitta at the trial to place him in the stolen vehicle. The government expert had examined the documents in August, 1969, over a year before trial, and had submitted a report on August 22, 1969, also over a year before trial.

The Court of Appeals affirmed the conviction with the weak admonition that the procedure, "left something to be desired. . .".

## REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the administration of criminal justice in the federal courts. The integrity of the Federal Rules of Criminal Procedure are at issue.

The procedure followed by the prosecution in depriving the accused of any meaningful discovery was not only a violation of Rule 16 of the Federal Rules of Criminal Procedure, and a blatant violation of two orders of the District Judge, but also violated Saitta's right to due process of law; the right to the effective assistance of counsel; the right to have compulsory process for obtaining witnesses in his favor; the right to be confronted by the witnesses against him; and the right to prepare a defense to the charge, all as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

We submit that the actions of the prosecution, in refusing and failing to produce the handwriting report and exhibits until just before the trial, not only "left something to be desired" but impeded and hampered defense counsel's investigation and preparation for trial by unrestrained and arbitrary power.

The accused should not have been compelled to abandon one method of defending against the charge below as he was required to do by the prosecution's failure to produce as ordered. One method of defending would have been by the use of cross-examination, and possibly by the use of defense handwriting experts to raise a reasonable doubt in the minds of the jury regarding the elements of Saitta's *possession* and of his *transporting* the stolen vehicle.

The testimony of the expert witness for the prosecution not only was directed to placing Saitta in the car but also placed him behind the wheel as the driver. Nowhere in the record is there an admission by Saitta that the handwriting on the traffic citations was in fact his. By the help of a qualified handwriting expert (who is available in this area, but who was temporarily out

of the city), Saitta may well have refuted or cast doubt upon the findings of the prosecution's expert during the Government's case in chief.

The accused should have been allowed to make a meaningful choice between the two possible methods of defending and should not have been compelled to reject one because of the prosecution's failure to comply with the rules of procedure and the orders of the Court. Only the uncorroborated testimony of an accomplice, whose testimony against Saitta secured his freedom, places Saitta as the driver of the car and as a knowing participant in the crime charged. This Court should be informed that Saitta has always, (as he does now) professed his innocence. If the Government expert was wrong in his conclusions (as is possible), or if a reasonable doubt could have been raised concerning his conclusions (as is also possible if the defense counsel could have meaningfully cross-examined), the jury verdict may well have been for acquittal of this accused who professes his innocence. We submit that preventing the accused and his counsel from exploring this avenue of defending against this charge was prejudicial to the extreme.

The Sixth Amendment guarantee of the right to counsel required the "effective" assistance of counsel as early as 1932. *Powell v Alabama,* 287 U.S. 45, 71. The word "effective" connotes the state of being capable of bringing about an effect; i.e., equipped and ready for service. The defense attorney was incapable of giving effective aid in determining the proper defense because the information and expert witnesses available to the prosecution were not available, or at the defense disposal, due to the prosecution's actions and not due to the lack of attempted preparation of the defense.

It is extremely difficult, if not impossible in most cases, for a party unschooled in the subject of handwriting expertise to effectively challenge the findings and conclusions of an expert without the aid of his own expert. See *State v Hancock,* 164 N.W. 2d 330 (Iowa 1969). As held in *State v Hancock,* supra, an independent analysis of the handwriting samples examined by the prosecution's witness by a qualified expert of Saitta's choosing could well have resulted in a conclusion diametrically opposed to that reached by the Government expert. If such was the result a strong inference would have arisen that Volpe, the admittedly perjurous, alleged accomplice, would have been the author of the signature on the traffic tickets. Saitta's expert may even have been able to demonstrate this fact, to the utter destruction of the prosecution's case.

By ignoring the rules of discovery and the orders of the District Court, the prosecution effectively prevented Saitta from even the possibility of obtaining evidence which may have been highly relevant and material to a meaningful defense. A continuance for a few days or weeks would have allowed the defense an opportunity to explore this defense. Whether or not such evidence would be available cannot be ascertained from this record but the fault is that of the prosecution. If the clear orders of the Court allowing discovery had been complied with by the Government, this problem would not have arisen. Effective assistance requires that each defense in the accused's favor should be sought out, efficiently prepared, and adequately presented. Saitta was prevented from having such effective assistance.

The right to be confronted by the witnesses against Saitta guaranteed by the Sixth Amendment preserves the right to cross-examine them. The value of cross-ex-

amination is questionable if defense counsel is unable to obtain expert consultation on the technical aspects of the testimony of an expert witness for the prosecution.

The assistance of a handwriting expert for Saitta was necessary to preserve his "right to a fair trial as affected by his right *meaningfully* to cross-examine the witnesses against him". *United States v Wade,* 388 U.S. 218, 227 (1967, emphasis supplied). Prejudice inured to Saitta from the conduct of the prosecution, complained of, which prevented such meaningful cross-examination.

The Sixth Amendment further provides that Saitta shall have compulsory process for obtaining witnesses in his favor. Where, as here, the Government's case in chief was founded upon testimony of a handwriting expert, the defense should have been provided with the documentary evidence examined by such expert so that the defense could call its own competent expert witness if desired. Although Saitta was afforded the right to call lay witnesses, he was deprived of the right to call expert witnesses. He was prejudiced by such deprivation and forced thereby to abandon a possible defense to the charge.

Saitta was deprived of due process, as guaranteed by the Fifth Amendment, when he was deprived of a full opportunity to prepare a valid defense of his choosing. The prosecution was allowed, in effect, to force Saitta into rejecting one possible defense by withholding the handwriting samples by which he could have investigated and intelligently exercised his choice. The opportunity to prepare a meaningful defense would appear to be no less essential than the opportunity to prepare a meaningful appeal. See *Douglas v California,* 372 U.S. 353 (1963).

Saitta was entitled to the disclosure of the handwriting report and samples so that he could make a decision, before trial, as to the most beneficial method of presenting a defense. In *United States v Hughes,* 433 F2d 1244 (5th Cir., 1969), the Court realized that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice" (Citing *Dennis v United States,* 384 U.S. 855). No respectable interest of the government is served by its concealment of information which is material to the case, including all possible defenses. Noncompliance with the discovery orders was a serious detriment to the preparation for trial and Saitta's defense strategy was determined by the failure of the prosecution to comply. Where such is the case there should be a new trial. *United States v Padrone,* 406 F2d 560 (2nd Cir., 1969).

The Courts have amply recognized that independent handwriting experts are necessary for the defense to prepare an intelligent defense. *Gilbert v California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.ed 2d 1178 (1967); *Bass v United States,* 6th Cir., 1957, 239 F2d 711.

As this Court has stated:

> ". . . disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice . . . In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *Dennis v United States,* 384 U.S. 855, 86 S.Ct. 1840, 16 L.ed 2d 973 (1966).

No such compelling considerations were advanced by the government, or even suggested, in this case.

## CONCLUSION

For the reasons advanced, and in the interest of justice, the Petition should be granted.

Respectfully submitted,

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*Attorney for Petitioner*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above Petition were furnished by Air Mail, Special Delivery, to the Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D.C., 20530, and to the Honorable Hugh Smith, Assistant U.S. Attorney, U.S. Post Office Building, Tampa, Florida, on this the ——— day of August, 1971.

RAYMOND E. LAPORTE

## APPENDIX

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IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 30761

Sumary Calendar*

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*versus*

LEO JOSEPH SAITTA,

*Defendant-Appellant.*

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Appeal from the United States District Court for the Middle District of Florida

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(June 15, 1971)

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Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: Appellant was convicted on a two-count indictment charging transportation of a stolen automobile from New York to Florida in violation of the Dyer Act, 18 USCA, § 2312, and conspiracy to violate the same Act in violation of 18 USCA, § 371. This appeal followed. We affirm.

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*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Appellant's first ground for reversal is that the trial court erred in failing to grant his motion for continuance or to exclude certain documentary evidence. This claim is based on the assertion that the government failed to comply with specified discovery orders until the day before the trial thus unduly prejudicing him in the preparation of a defense.

While a careful study of the record discloses that the government's conduct in failing to promptly comply with discovery orders entered pursuant to Rule 16, F.R.Crim. Procedure, left something to be desired, nevertheless no prejudice inured to appellant from this conduct. The subject matter of this allegation of error was handwriting samples and a FBI report concerning the samples. The report was directed to placing appellant in the stolen vehicle through his signature on a traffic violation citation.

This material was finally delivered to appellant's counsel on the day before trial, too late to obtain a defense handwriting expert. In any event, the entire issue was washed out by the defense theory which placed appellant in the vehicle on the occasion in question.

Appropriate relief for a violation of the discovery rules lies within the sound discretion of the district court, *Gevinson v. United States,* 5 Cir., 1966, 358 F.2d 761, 766; *Ginsberg v. United States,* 5 Cir., 1958, 257 F.2d 950, 956, but we do not reach the question of an abuse of discretion here. It suffices to say that an error in administering the discovery rules is not reversible absent a showing that the error was prejudicial to the substantial rights of the defendant. *Hansen v. United States,* 8 Cir., 1968, 393 F.2d 763, 770. There is no showing of such prejudice here.

Appellant next complains that the trial court erred in failing to exercise its discretion to limit cross-examination of appellant concerning previous convictions, relying on *Luck v. United States,* D.C., Cir., 1965, 348 F.2d 763. The law is clear in this circuit that any wit-

ness, including a defendant who elects to testify, can be discredited by a showing of prior felony convictions or misdemeanor convictions involving moral turpitude. *Bendelow v. United States,* 5 Cir., 1969, 418 F.2d 42, 49; *Beaudine v. United States,* 5 Cir., 1966, 368 F.2d 417, 421; *Taylor v. United States,* 5 Cir., 1960, 279 F.2d 10, 12; *Daniel v. United States,* 5 Cir., 1959, 268 F.2d 849, 852; *Robertson v. United States,* 5 Cir., 1967, 249 F.2d 737, 741. Had this appellant elected to testify, he would have been subject to this rule. It was therefore not error for the trial court to refuse to limit the government in advance. Moreover, there was no proffer as to the fact of the previous convictions and thus nothing to form the basis of an exercise of discretion as required in *Luck v. United States,* supra. The record makes it plain that the court exercised its discretion on the meager facts presented and even stated to counsel that he had not been advised as to just what the prior convictions were.

Appellant's final assignments of error are that the Assistant United States Attorney mistated the evidence and also injected his personal beliefs into the case during his closing argument to the jury. We have carefully examined the record and can find both assignments without merit.

AFFIRMED.

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30761

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*versus*

LEO JOSEPH SAITTA,

*Defendant-Appellant.*

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 15, 1971, 5 Cir., 1971, —— F.2d ——).

(July 19, 1971)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.